TENNESSEE AND THE REMOVAL OF THE CHEROKEES*

The story of the relation of the Indian tribes of North America to the Government of the United States is a long one, in which the removal of the Cherokees, at the close of Jackson's second administration, and the events which led up thereto, form a chapter of striking dramatic interest. To this interest many things contributed. The sentimental feeling honestly voiced by some, and skillfully used by others, was one phenomenon; more important, however, was the fact that the sovereignty of the State of Georgia was felt by that State to be involved, and that with the sympathy of President Jackson, she was permitted to disregard not an act of Congress, but a mandate of the Supreme Court of the United States. The cases of the Cherokee Nation vs. Georgia and Worcester vs. Georgia represented the judicial climax of these events, which found their political *dénouement* in the Treaty of 1835-36, whereby provision was made for the removal of the Cherokees west of the Mississippi.

The very fact that Georgia was the protagonist of these years and had the satisfaction — if such it were — of successfully defying the Supreme Court, has attracted to the part of this State in the general question of the removal of the Indian tribes almost the entire attention of the historians of this period. It has been observed, indeed, that Alabama and Mississippi, following Georgia's example, passed acts extending the jurisdiction of these States over the Indians within their borders; but the legislation and litigation in the same connection of Tennessee, Jackson's own State, appear to have been largely neglected.

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Yet in Tennessee there were developments which, if less important than those in Georgia, were sufficiently striking to deserve close study, and which if events had taken another turn, might have furnished a judicial and political test no less significant than those afforded in the Georgia cases. To recount succinctly these developments will be the attempt of this essay.

The close of the Revolutionary War left an evident community of interest to the Southern States, especially to the Carolinas and to Georgia, in the occupation by the Cherokees and other Indian nations of the western territory which these States claimed. After their cessions of this territory to the United States, and the establishment of new commonwealths therein, the same problem confronted these later members of the Union, Alabama, Mississippi, and — before either of these —Tennessee. In the case of the last named, the presence of the Indians was a condition into which the State was born; in its infancy Tennessee, like Kentucky, was a "dark and bloody ground" of Indian wars, whose terrors were chronicled long ago in the nervous pages of Haywood. But most of the detailed narratives of Tennessee history, from Ramsey to Roosevelt, stop with the pioneer days, and do not sufficiently emphasize the continuance of this contact with and fear of the Indians over into the maturer years of the State's life. Whereas Georgia and Alabama, as their population increased, developed from the seacoast inland until they could no longer tolerate the Indian communities as barriers, Tennessee began her life in the interior, surrounded, and, indeed, divided by Indian country, and spread outward to the Mississippi and to the boundaries of the neighboring States. This process involved the dislocation of the Indians from block after block of territory, and the struggle was a long and painful one.

As immigration increased, and the people from over the mountains poured in, the two triangles of white settlement which had Nashville and the Watauga country as their beginnings, widened in belts or strips of acquired territory, until in 1804, 1805 and 1806, and later, in 1817, 1818, and 1819, very large additions were made by treaties which brought the jurisdiction of the State — except in one direction — into full coinci-

dence with its political boundaries. Of the exception, more will be said hereafter. In the interval between the first of these groups of treaties (that of 1804-06), and 1819, the extinction of the Indian title was of paramount interest in the Federal relations of the State. The matter was of course intimately interwoven with the territorial dispute between North Carolina and Tennessee. During the latter part of the same period, the emigration or removal of the Cherokees was continually debated, and not only Andrew Jackson, but other leaders of Tennessee politics were deeply interested therein. Joseph McMinn, Governor of Tennessee from 1815 to 1821, was one of the Commissioners with Jackson and Meriwether to negotiate the Treaty of 1817, and in 1823 was appointed as agent to the Cherokees vice R. J. Meigs, who had died.[1] Not only was McMinn a strong advocate of removal, but William Carroll, his successor as Governor of the State, was chosen by Jackson for special service in the affair with the Cherokees.[2] Besides this connection of the most important Tennessee officials with the question of removal, the friction that arose from Indian occupation was kept alive even in those parts of Tennessee which the Indians had ceded, through the fact that there had been some reservations of lands to individual Indian families; and over these much litigation ensued.[3]

When Jackson began his first administration, and in his messages elaborated his views as to the removal of the Indian tribes, it was significant that, in each of the Houses of Congress, the chairmanship of the Committee on Indian Affairs was given to a Tennessean: in the Senate to Hugh L. White, in the House to John Bell. Both of these supported heartily the President's

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[1] Royce: "The Cherokee Nation of Indians." Fifth Annual Report of the Bureau of Ethnology, 1883-84: Washington, 1887, p. 236.

[2] Royce, pp. 259-260, 253-257.

[3] Ibid., p. 218, n. 2, pp. 223-225, 232-233, 256; and the following Acts of Tennessee: 1819, ch. 59, sec. 1; 1819, ch. 60, sec. 1; 1821, ch. 170; 1822, ch. 27; 1825, ch. 41; 1831, ch. 38. The Tennessee cases, particularly Cornet vs. Winton, Blair and Johnson vs. Pathkiller's lessee, and Holland vs. Peck, may be found in Yerger's Reports, Vol. II, and Peck's Reports. Compare also the earlier excitement of 1816. American State Papers, folio, Indian Affairs, Vol. I.

ideas, and their reports, as well as the talks of Jackson and Eaton with the Cherokee chiefs, were carefully detailed in the newspapers of Tennessee.[4]

Had the Treaties of 1817-19 removed all the Indians from Tennessee, there was enough in matters just referred to for us to feel that the Indian policy thus enunciated was dictated not merely by Georgia's arguments and by Jackson's own wishes, but by the feeling and experience of his own State. But all the Indians had not been removed from Tennessee, and were not removed until after the treaty of 1835. As we have suggested above, there was an important exception to the extinction of the Indian title. All the treaties thus far noticed had left in the possession of the Cherokee Nation a considerable tract of land in the Southeast corner of the State, comprising several hundred thousand acres.[5] As to this territory, therefore, Tennessee was in exactly the same situation as Georgia; and two years before the Treaty of 1835, Tennesssee acted as Georgia had acted. In 1828 Georgia, in 1829 Alabama, and in 1830 Mississippi, had passed laws extending the jurisdiction of these several States over the Indian lands within their borders. Shortly after, the case of The Cherokee Nation vs. Georgia went up to the Supreme Court of the United States and was decided in 1831. The next year came the decision in Worcester vs. Georgia, which, as is well known, President Jackson did not enforce. Meanwhile, in the sessions of the Tennessee Assembly which met in 1829, 1831, and 1832,[6] there was considerable discussion of petitions and bills for the extension of the civil jurisdiction of this State over the Indian territory within her limits. These bills did not pass, but in the session of the next year, 1833, William Carroll, now entering upon the last term of his long service as Governor of the State, brought up in his first message the matter of the Cherokees. He had been informed that a respectable portion of the citizens residing in the counties bordering on the Cherokee Nation were desirous that the laws of the State should be

[4] Nashville *Republican*, March 12 and March 30.

[5] Later known as the "Ocoee District."

[6] House Journal of 1829, September 28; Senate Journal of 1831, December 20; Senate Journal of 1832, October 20.

extended over the Indians within their limits. The Act of Congress of 1802 extended only to the regulation of trade and intercourse with the Indians, and it was thought questionable whether any authority existed to punish crimes committed within that portion of the State to which the Indian title had not been extinguished; nor was it believed that there was authority to enforce civil contracts. If this were correct, he thought the power of the State to pass laws for the punishment of crimes committed within its limits and to coerce the payment of debts could not well be doubted.[7]

In each house, the matter was referred to a select committee. That of the House brought in, on the 23rd, a long report, in which was discussed the general question of the position of the Indian tribes, and especially the importance of the matter to Tennessee; with some sharp criticism of the doctrines recently advanced by the Supreme Court.[8] While the Assembly was thus occupied, the United States Circuit Court, sitting at Knoxville for the October term of that year, declared the Federal law of 1817 unconstitutional, because the power of the United States to regulate commerce with the Indian tribes did not authorize Congress to pass laws punishing crime.[9] Thus the Indians were apparently without any criminal jurisdiction over them except their own. The Legislature then proceeded with a bill similar to those which had failed before; but the act which was passed was far more moderate than the legislation of Georgia. The civil jurisdiction of the State was completed by extending the limits of the counties of Marion, Hamilton, Rhea, McMinn and Monroe so as to include the country within the occupancy of the Cherokee Indians which lay within the boundary of the State of Tennessee. But the act declared that the courts should not take jurisdiction of any criminal offence committed within the Indian territory by any Cherokee Indian residing therein, except for murder, rape, or larceny. The usages and customs of the Indians in all other respects were allowed to them

[7] House Journal of 1833, September 16, p. 12.

[8] Ibid., pp. 40-45.

[9] Stated by Catron, Chief Justice of Tennessee, in VIII Yerger, p. 32. The case was the United States vs. Bailey.

within the Indian boundary. No white man was allowed to settle on the lands of the Indians, nor was the act to be construed to invalidate any law or treaty of the United States, made in pursuance of the Constitution thereof. It did not authorize any entry, appropriation, or occupancy of any of the lands within the Cherokee country.[10]

Two years later Governor Newton Cannon informed the Twenty-first General Assembly that the Act had not as yet been carried fully into effect.[11] Before any conclusive action was taken on this, however, the executive transmitted a letter from the Chief Justice of Tennessee, which urged the Legislature to make provision for securing counsel to represent the State in an important case to be argued on writ of error, at the next January term, before the Supreme Court of the United States.[12]

The case referred to was that of The State of Tennessee against James Foreman; and the facts, as stated in the record, may be outlined briefly as follows. Foreman was indicted in the Circuit Court of McMinn County, for the murder of John Walker. He pleaded that both he and Walker were native Cherokee Indians, and that the offence charged, if committed at all, was committed beyond the rightful jurisdiction of the courts of Tennessee, and within the Cherokee Nation. The Act of 1833 was alleged to be unconstitutional and void. On appeal in error to the Supreme Court of the State, this court held that the plea was insufficient, and that the Act of 1833 was constitutional. Chief Justice Catron and Justice Green concurred; Justice Peck dissented.

The opinion of Justice Catron was an extensive document, covering eighty pages of Yerger's Reports. The Chief Justice began with a long historical introduction, going back to the mediæval theory as to the conquest of heathen and barbarous countries, the right claimed by the Pope to dispose of all countries possessed by infidels, Calvin's case, the colonial charters, and the exercise of sovereignty by North Carolina.

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[10] Acts of 1833, ch. 16. Yerger's Reports, VIII, p. 257.
[11] Senate Journal of 1835, p. 37.
[12] Ibid., pp. 106-109.

He distinguished between sovereignty and the right of soil, and quoted the North Carolina laws which forbade anyone to buy from the Indians. While the title to their land might be retained by the Indians, jurisdiction belonged to the Christian powers. If, however, this primal right of the Christian over the infidel were denied, and the right of conquest were the only plausible one, what was the condition of the Cherokees? In answer, he went into a most interesting review of the relations of the Indians to the Colonial government under the British crown, and the succession of the States to all the rights of Great Britain. He emphasized the protest of North Carolina against the Treaty of Hopewell, and the "assumptions of Federal power" by the Congress under the Articles of Confederation. Catron's central thesis was that the treaty-making power of the United States Government existed *under* the Constitution, not outside of it. He quoted Story on this point, and added:

"Admitting that the treaty power can be exerted to form international compacts with a people of our own country, and within the scope of the legislative power; and that Indian treaties are of higher dignity than mere contracts for the purchase of the Indian title to the lands which they occupy (which I believe they are not), still over the territory where the separate States had the power of legislation at the formation of the Constitution, neither Congress or the treaty power can take jurisdiction because it is reserved to the States, and the people. . . . . To hold that the President and Senate, by treaty with the Cherokees, could create a power to legislate for them; and that Acts of Congress, punishing all crimes committed by our citizens on the Indians, or by the latter on our citizens (as does that of 1817), were warranted by the treaties, would be assuming that, by a combination of the two powers, new governments could be formed by an indirect and lurking power in the Constitution, certainly never claimed for it by its early advocates in the State conventions, called for its adoption."

The decision in Worcester vs. Georgia, Catron declared to be sound, because the Federal government under its constitutional power to regulate commerce could insure the freedom of intercourse of those authorized by its own laws to enter the Cherokee Nation. It was the reasoning of Chief Justice Marshall as

to the *status* of the Indian tribes that Catron repudiated.[13]

As we have before remarked, it was stated by the Governor that Tennessee had been cited to appear before the Supreme Court. No further record of the case appears, nor is any mention of such a case to be found in Peters's Reports. The reason is probably not far to seek. The negotiations of 1835 were in progress, and on December 29, the Treaty of New Echota was successfully concluded. This indicated the speedy removal of the Cherokees, and there was no longer any principle involved.[14] But the passage of the Act of 1833 by a Legislature under the control of the Jackson party, and the closely argued decision of one of Jackson's strongest political supporters, both taking place *after* Marshall's decision in Worcester vs. Georgia, were aggressive steps which, if the case had come before Marshall, could hardly have been regarded as other than a direct challenge. In a few weeks, John Marshall was dead; a year later, Catron was appointed by Jackson to a seat upon the Supreme Bench.

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[13] VIII Yerger, pp. 256-337. Justice Green concurred, reaching the same conclusions chiefly on the ground of expediency and intimating that it was a political matter. Justice Peck, dissenting, upheld the treaty-making power. Ibid., pp. 337-353, 353-370. The argument of Yerger, for the State, is in the appendix.

[14] Another incident, not essential to this narrative, was the coming across the Tennessee line of the Georgia Guard, which aroused feeling in Tennessee and necessitated an explanation by Georgia.